STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RAYMOND D. DAVIS,

Defendant-Appellee.

UNPUBLISHED
October 18, 2007

No. 277598
Wayne Circuit Court
LC No. 06-014376-01

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant is charged, as a third habitual offender, MCL 769.11, with possession of ecstasy, MCL 333.7403(2)(b)(i), felon in possession of a firearm, MCL 750.224f, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. After a pretrial motion hearing, the trial court granted defendant's motion to suppress defendant's statement to police. The prosecution appeals by leave granted.[1] We reverse and remand for an evidentiary hearing.

This case arises out of the execution of a search warrant at a residence in Detroit on September 13, 2006. At defendant's preliminary examination, evidence was presented that police officers arrived at the residence around 2:00 p.m. The officers secured the premises, which was occupied by three individuals. In the rear bedroom, the officers found marijuana, ecstasy, two loaded handguns, and a digital scale next to the bed as well as large clothes. During the raid, one of the officers approaching the rear of the house saw defendant jump from the rear bedroom window. The officer "froze" defendant and brought him inside the house.

Officer Robert Gadwell was watching the individuals in the house who were detained during the search, including defendant, and "got some basic information from them." Specifically, Gadwell asked who lived at the house. Defendant answered that he did. Defendant

[1] The prosecution's delayed application for leave to appeal was initially denied. *People v Davis*, unpublished order of the Court of Appeals, entered March 22, 2007 (Docket No. 276674). The prosecution then filed an application for leave to appeal with our Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded this case for consideration as on leave granted. *People v Davis*, 477 Mich 1110; 729 NW2d 841 (2007).

also indicated that he was 5'11'' tall and weighed 240 pounds. Gadwell was then informed that drugs were found in the house, and he arrested defendant and read him his *Miranda*[2] rights.

Defendant indicated that he understood his rights, but refused to sign the acknowledgement form to that effect. After taking "some basic information" from defendant, including defendant's address, Gadwell asked defendant about "some things pertaining to the case." Defendant engaged in a short conversation with Gadwell. At the preliminary examination, when defense counsel questioned Gadwell about this conversation, the following exchange ensued:

> *Q.* [A]ccording to your testimony, you asked [defendant] if he understood his rights; he said: Yes. You asked him what was he doing in the house, and you – he said: Chilling, playing a game.
>
> Question: Why did you run when the police came?
>
> Answer: I had some weed and I was scared.
>
> Question: What were you going to do with the marijuana?
>
> Answer: I don't want to say anything.
>
> *A.* That's correct.

The conversation between Gadwell and defendant occurred in the bedroom where the contraband was found.

After defendant was bound over for trial, he filed a motion to suppress the statements he made to police or for an evidentiary hearing on this matter. Regarding the evidentiary hearing, the prosecution noted that "[t]here might be an issue of evidentiary hearing [regarding] whether this second statement after *Miranda* was voluntarily made or not[.]" Based on the preliminary examination transcript, the trial court ruled that an evidentiary hearing was unnecessary and that defendant's statements to police should be suppressed. The court explained that the police improperly obtained defendant's initial statement, which was "critical" to the charges against him because it was taken before providing defendant with *Miranda* warnings, and that after receiving *Miranda* warnings, defendant did not freely and voluntarily provide his second statement to police.

On appeal, the prosecution argues that the trial court erred by basing its ruling on defendant's motion solely on the preliminary examination transcript. We agree. Generally, we review a trial court's decision to conduct an evidentiary hearing for an abuse of discretion. *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999). However, because a trial court's decision to hold an evidentiary hearing in the absence of a stipulation is determined as a matter of law, *People v Talley*, 410 Mich 378, 390, 390 n 3; 301 NW2d 809 (1981), overruled in

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

part on other grounds *People v Kaufman*, 457 Mich 266, 276; 577 NW2d 466 (1998), our review is de novo, *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004) (stating that questions of law are reviewed de novo).

In *Talley*, our Supreme Court ruled that a trial court may not exclusively rely on a preliminary examination transcript in determining a suppression motion. *Talley*, *supra* at 390, 390 n 3. This decision was overruled in *Kaufman* "insofar as it has been understood to mean that counsel cannot agree to have a motion to suppress decided on the basis of the record of the preliminary examination." *Kaufman*, *supra* at 276.

Here, there was no agreement that the trial court could exclusively rely upon the preliminary examination in deciding defendant's suppression motion. Indeed, not only did defendant file a motion for an evidentiary hearing, but the prosecution also specifically indicated that an evidentiary hearing may be necessary.[3] Consequently, the trial court's exclusive reliance on the preliminary examination transcript was improper.

Relying on *People v Futrell*, 125 Mich App 568, 572-573; 336 NW2d 834 (1983), defendant claims that an evidentiary hearing was not warranted because the preliminary examination transcript provided sufficient facts to decide the motion and because the prosecution failed to show how an evidentiary hearing would reveal additional facts supporting its position. However, defendant's reliance on *Futrell* is misplaced. There, the ruling was premised not only on the fact that the prosecution did not "point to any area in which further elucidation of the facts might advance [its] position," but also on the basis that the prosecution did not dispute the facts before the trial court from the preliminary examination transcript. *Id*. In contrast, the prosecution in this case expressly noted that an evidentiary hearing may be necessary – in other words, that the preliminary examination transcript may be insufficient. Thus, defendant's argument fails.

In light of our resolution of this issue, we need not address the prosecution's remaining argument that the trial court erred in suppressing defendant's statements. We reverse the trial court's order suppressing defendant's statements and remand for an evidentiary hearing concerning this issue. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette

[3] Given this statement, defendant's claim that the prosecution has waived this issue fails. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (noting that the "intentional relinquishment or abandonment of a known right" constitutes a waiver that precludes appellate review).